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IN THE
SUPREME COURT OF THE UNITED STATES

RALPH E. McGREGOR,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Defendant in Error.

PETITION FOR WRIT OF CERTIORARI

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vs.

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To The Chief Justice And Justices Of The Supreme Court Of The United States:

The petitioner Ralph E. McGregor, respectfully represents that he is aggrieved by the final judgment of the Supreme Court of Appeals of Virginia, whereby the Petition of Ralph E. McGregor for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Stafford County in a proceedings by the Commonwealth of Virginia against the petitioner for a misdemeanor was rejected and refused.[1]

The judgment complained of found the defendant guilty of impersonating a state police officer and fixed his punishment and confinement in jail for a term of six months and a payment of a fine of Two Hundred and Fifty ($250.00) Dollars and costs.

The petitioner asks that he may be granted a writ and relief from the said judgment and in support thereof sets forth the following:

[1] Appendix A.

JURISDICTIONAL GROUNDS

The date of the judgment sought to be reviewed and the time of its entry was January 19, 1965. No written opinion was delivered by either the Circuit Court of Stafford County or the Supreme Court of Appeals of Virginia.

The statutory provision believed to confer on this Honorable Court jurisdiction to review the said judgment in question by writ of certiorari is 28 USCA, Section 344 (b) and Rule of the Supreme Court of the United States, Part V, Section 19 (b).[2]

The question presented for review is whether the violation by the Virginia Supreme Court of Appeals of its own rules of Court in turn violated the constitutional rights and privileges of the petitioner and specifically Amendments V and VI of the Constitution of the United States, whereby a defendant in any criminal case cannot be deprived of his life, liberty or property without due process of law and is entitled to enjoy the right to a speedy trial.

This case involves the violation of Part Five, Appellate Proceedings, *Rule 5:3, Section 5 of the Rules of Court of the Virginia Supreme Court of Appeals,* which rule states:

> "Brief in Opposition. Within fourteen days from the date on which the copy of the petition is mailed or delivered to opposing counsel, he may file a written brief in opposition to granting the appeal but will not

[2] ". . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

be heard orally. Within the same time he shall mail or deliver a copy to counsel for petitioner. The brief may be filed with the Clerk of this Court or presented to the Justice to whom the petition was presented. If more than ten pages, it shall contain a subject index and table of cases alphabetically arranged.

When it clearly appears that an appeal ought to be allowed without further delay, an appeal may be allowed prior to the filing of the brief in opposition." 202 Va. liii

MATERIALS FACTS

This case was before the Virginia Supreme Court of Appeals on a petition for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Stafford County, Virginia, on the 30th day of April, 1964, on five assignments of error cited by the petitioner. These assignments mainly argued that the petitioner, being actually a police officer in the State of Maryland, was not within the purview of the impersonation statute[3] and on the question of whether the trial court improperly admitted evidence of a later crime allegedly committed by the petitioner in Prince William County, Virginia.

The petition for the writ of error was timely filed on

[3] Va. Code Section 18. 1-311. "Impersonating officer.—Any person who shall falsely assume or exercise the functions, powers, duties and privileges incident to the office of sheriff, police officer, marshall, or other peace officer, or who shall falsely assume or pretend to be any such officer, shall be deemed guilty of a misdemeanor."

June 29, 1964, and on the 14th day of October, 1964, almost four months after the petition for a writ was filed, the Virginia Supreme Court of Appeals entered its order requiring the Commonwealth's Attorney for Stafford County to file a response to the petition on or before November 25, 1964.[4]

On November 6, 1964, counsel for the petitioner filed his Objection to the order of that Court, entered on the 14th day of October, 1964, as follows:

> "The plaintiff in error, Ralph E. McGregor, by counsel, respectfully objects and excepts to the Order of this Court, entered on the 14th day of October, 1964, . . . on the following grounds:
>
> (1) That the said order is in violation of Rule 5:3, Section 5, of this Honorable Court, which requires a brief or response in opposition to granting an appeal to be filed by opposing counsel within fourteen (14) days from the date on which the copy of this petition is mailed or delivered to opposing counsel.
>
> (2) The petition of Ralph E. McGregor was mailed to opposing counsel on June 29, 1964, more than four months ago and said Rule 5:3, Section 5, states that, within the same fourteen days, opposing counsel "shall mail or deliver a copy to counsel for petitioner" of his brief in opposition.

[4] Appendix B.

(3) That Virginia Code, Section 2-90 requires the Attorney General to appear and represent the Commonwealth in all criminal cases before the Supreme Court of Appeals in which the Commonwealth is a party.

Counsel for the petitioner respectfully requests leave of this Court to be heard orally on this objection." (Certification of Service)

On the 6th day of November, 1964, counsel for the petitioner also filed his Motion to Vacate, as follows:

"Comes now the plaintiff in error, Ralph E. McGregor, by counsel, and respectfully moves this Honorable Court to vacate and set aside its order, entered on the 14th day of October, 1964, . . . on the following grounds:

(1) That while this Court undoubtedly has the right and power to make and prescribe rules of practice and procedure before all courts of the Commonwealth, its own Rule 5:3, Section 5 requires a brief in response in opposition to granting an appeal to be filed by opposing counsel within fourteen (14) days from the date on which the copy of the Petition is mailed or delivered to opposing counsel and further directs that he "shall mail or deliver a copy within fourteen (14) days" of his response to counsel for the petitioner, and that this rule, to the knowledge of the petitioner, has not been changed, altered or modified.

(2) That if the said Rule 5:3, Section 5, of this Court has been changed, altered or modified, the same has not been published, indexed and annotated by the Virginia Code Commission as required by Virginia Code Section 8-86.1.[5]

(3) That the order of this Court, dated the 14th day of October, 1964, apparently contrary to the paramount rules of this Court and the Virginia Code Sections herein noted, and varying established rules of practice and procedure, is disquieting to members of the bar, since the bar has always felt that strict adherence to the rules of Court was mandatory upon all Courts and attorneys in the Commonwealth.

(4) That Virginia Code Section 2-90,[6] in the last sentence thereof, is a mandate to the Attorney General to appear and represent the Commonwealth in all criminal cases before this Honorable Court in which the Commonwealth is a party or is directly interested and any variance therefrom constitutes

[5] 8-1. 2. Rules of Court to appear in Code and supersede conflicting statutes.—"The Virginia Code Commission is directed to include the rules adopted by the Supreme Court of Appeals, effective February one, nineteen hundred fifty, and all subsequent amendments, in the Code of Virginia, and cause them to be properly indexed and annotated. . ."

[6] Criminal cases—"In all criminal cases before the Supreme Court of Appeals in which the Commonwealth is a party or is directly interested, the Attorney General shall appear and represent the Commonwealth."

an undue burden upon the Commonwealth's Attorney for Stafford County in this case.

(5) That the order of this Honorable Court, dated the 14th day of October, 1964, constitutes a prejudicial delay to the plaintiff in error in that the Petition of Ralph E. McGregor was mailed to the Commonwealth's Attorney for Stafford County and filed with the Clerk of this Court on June 29, 1964, more than four months ago, which delay violates the constitutional mandates whereby a defendant in any criminal case is guaranteed a speedy trial.

Counsel for the petitioner respectfully requests leave of this Court to be heard orally on this Motion."

(Certification of Service)

On the 23rd day of November, 1964, the Virginia Supreme Court of Appeals entered the following Order, having, in effect, overruled the Objection and denying the Motion to Vacate as follows:

"This day came again the plaintiff in error, by counsel, and moved this court to vacate and set aside its order entered herein on October 14, 1964, requiring the Commonwealth's Attorney of Stafford County to file a response to plaintiff in error's petition for a writ of error and supersedeas.

On mature consideration whereof, this motion is denied."

On or about November 25, 1964, the Commonwealth's Attorney for Stafford County filed his response as ordered.

On December 10, 1964, Counsel for the petitioner filed the following Motion to Strike:

"Comes now the plaintiff in error, Ralph E. McGregor, by counsel, and respectfully moves this Honorable Court to strike, and therefore not consider, the response of the Commonwealth's Attorney for Stafford County to the Petition of Ralph E. McGregor for a writ of error and supersedeas, which said response was heretofore filed on the 24th day of November, 1964, on the grounds heretofore set forth in the petitioner's Objection and Motion to Vacate, as follows:

1. (Same as previous motion)

2. (Same as previous motion)

3. (Same as previous motion)

4. That Virginia Code Section 2-90, in the last sentence thereof, is a mandate to the Attorney General to appear and represent the Commonwealth in all criminal cases before this Honorable Court in which the Commonwealth is a party or is directly interested.

5. That the order of this Court dated the 14th day of October, 1964, made no provision for the filing of a reply by counsel for the petitioner in response to the brief filed by the Commonwealth's Attorney of Stafford County.

6. That the order of this Honorable Court, dated the 14th day of October, 1964, constitutes a prejudicial delay to the plaintiff in error in that the pe-

> tion of Ralph E. McGregor was mailed to the Commonwealth's Attorney of Stafford County and filed with the Clerk of this Court on June 29, 1964, more than four months ago, which delay violates the constitutional mandates whereby a defendant in any criminal case is guaranteed a speedy trial.
>
> Counsel for the petitioner respectfully requests leave of this Court to be heard orally on this Motion."
>
> (Certification of service)

On January 19, 1965, final judgment was entered by the Virginia Supreme Court of Appeals rejecting the petition and refusing the writ of error and supersedeas with no allusion to and without ruling specifically on the Motion to Strike.

Federal questions sought to be reviewed, as noted, were raised in the Virginia Court of Appeals by the petitioner's Objection, Motion to Vacate and Motion to Strike. The Objection and Motion to Vacate were denied, as above set forth. The Motion to Strike was not ruled upon in the Court's final judgment.[7]

ARGUMENT

THE DEPARTURE FROM THE VIRGINIA SUPREME COURT'S OWN RULE PROMULGATED AND VIOLATED BY IT DENIED THE PETITIONER HIS CONSTITUTIONAL GUARANTEES OF A RIGHT TO A SPEEDY TRIAL AND HIS RIGHT NOT TO BE DEPRIVED OF HIS LIBERTY

[7] Appendix A.

OR PROPERTY EXCEPT BY DUE PROCESS OF LAW.

In the interest of brevity, it is too well established to require citation to support the inherent power of courts to prescribe rules of practice. In most jurisdictions, Virginia included,[8] this inherent power is conferred by legislative enactment. The limitations on this power are few. A rule may not contravene a statute or the organic law. *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 53 S. Ct. 721. A rule cannot enlarge or restrict jurisdiction. *Hurn* v. *Oursler*, 289 U. S. 238, 53 S. Ct. 586. A litigant may not be deprived of a substantial right by rule of Court "or so embarrassed in its exercise that he may be deprived without his fault of its benefit." 14 Am. Jur. Courts § 152 et seq.

The bar has always acknowledged and respected this power and strict obedience to the rules of court is generally demanded. A young lawyer need feel but one time the agony caused by a pleading rejected as late or the torture of explaining to a client a default the result of a rule breached. The practitioner works daily against the rush of time but realizes the necessity of reasonable rules to prevent needless delay and the orderly and speedy discharge of the Court's work.

The doctrine of mutuality flows through practically all facets of our law. Since rules of court, duly published, have the force of positive law, they are obligatory on both the Court and the litigant alike. *Weil* v. *Neary*, 278 U. S. 160, 49 S. Ct. 144. In 14 Am. Jur. *supra* at page 361, it is noted:

[8] Code of Virginia, Section 8-1.1.

> "This [obligation] is certainly true in so far as the parties and their counsel have acted upon them and have sought to preserve and protect their rights in compliance therewith. The Court cannot adopt a different rule and apply it retroactively to their prejudice or treat them as in default if they have conducted themselves as required by the rules of the Court, doing the acts required by them to be done, within the time and in the manner therein specified." (Citing 41 Am. St. Rep. 643)

The rule[9] with which we are here concerned is entirely reasonable. It is clearly designed to expedite orderly and speedy dispatch of the Court's work. It should be noted that, unlike this Court's companion rule,[10] the Virginia rule does not provide or permit an enlargement of time for filing a brief in opposition. It simply states that opposing counsel *may within fourteen* days from the date on which a copy of the petition is mailed or delivered to him, file a written brief in opposition to granting an appeal. (Italics supplied)

As heretofore noted, the Virginia Court waited nearly four months and then ordered the Commonwealth's Attorney of Stafford County to file a response, more than four months after it was due. By rule, a response was due not later than July 14, 1964. Opposing counsel filed, as ordered, on Nov. 24 or 25, 1964.

[9] Virginia S. Ct. Rule 5:3, Section 5, *supra*.

[10] Revised Rules of the Supreme Court of the U. S. Rule 24 (1).

Another rule[11] of the Virginia Court of Appeals states that criminal cases (and appeals from the Industrial Commission and Corporation Commission) "shall have precedence over other cases" as an exception to cases being placed upon the docket in the order in which they mature. The order of the Virginia Court of Appeals delayed the maturing of the instant case more than four months. Clearly this deviation by the court from its own rule was disquieting to defendant and counsel alike. Until October 14, 1964, the date opposing counsel was directed to respond, the petitioner, although with a cloud over his head, believed that he was going to have the opportunity to develop his case completely on the merits, the fourteen day period for a reply having long passed.

It is interesting to study the case of *Bill Oliver and Jones T. Oliver* v. *Commonwealth of Virginia*, 163 Va. 347, where the Commonwealth was favored by a dismissal of the petitioners' writ of error, because of the failure by them to include in their petition a fair statement of all the pertinent facts of the case. The entire case is extremely brief and is set forth verbatim:

> "(1) The Commonwealth of Virginia moved to dismiss the writ of error in this case because the appellants have not complied with subsection (b) of Rule II of this Court, which requires an appellant or plaintiff in error to include in his petition for a writ, or in his brief, a concise and fair abstract or statement of all the pertinent facts in the case, those which are controverted

[11] 202 Va. liv Rule 5:7-"Docket".

as well as those which are conceded. We are thus brought to a consideration of this point.

(2) The rules of the Court have a salutary purpose, and their requirements must be adhered to. It is perfectly patent that the petition in this case does not conform to the rule in the respect mentioned and accordingly it is our duty to dismiss the writ heretofore granted as improvidently awarded, which we do."

In that case, a non-jurisdictional rule was violated by the defendant and he paid the penalty. In the case at bar, in a similar rule, the benefits were waived by the Commonwealth, the rule ignored by the Court and the defendant paid, not the Commonwealth. It would seem that justice would surely require a refusal by the Court to enforce the rules in one case and to disregard or suspend the rules in another. Inconsistent application of the rules of court is inequitable favoritism and an abuse of judicial authority which should not go unchallenged. 14 Am. Jur. *supra*, page 362; 41 Am. St. Rep. 644.

Petitioner recognizes that there is a conflict, to some extent, with reference to the power of a court to except a single case from an unchanged rule. (*Yturbide* v. *U. S.* 22 U. S. 290, 16 L. ed. 342) The cases permitting an exception seemed to have been constrained to do so by clear necessity in the interest of complete justice and without prejudice to any party.

It is clear that the violation of the Court's rule by it in this case operated to defeat petitioner's constitutional rights to have his case speedily attended to and matured. When no

response was filed by the Commonwealth by its due date, on July 14, 1964, the case was by rule mature. The petition should then have gone on the docket and heard on it alone. Additionally, due process for the petitioner required that his case be handled according to the published, unchanged, unmodified and unrepealed rules of the Virginia Court of Appeals. These rules, while in that state, and until lawfully changed, have the force and full effect of positive law. The petitioner is entitled to all of the benefit of that positive law denied him in the Court below by its unwarranted and unjustified departure from its rules.

Petitioner, in the Court below, was further aggrieved by the Court's refusal to grant him leave to be heard orally on his Objection, Motion to Vacate and Motion to Strike. It is felt that he was entitled to his full day in court. Due process of law would certainly entitle him to be heard in full, especially after having denied him the right to have his petition docketed and set for hearing when, by law, it was mature.

In the interest of preserving the constitutional rights of this petitioner as well as preserving the orderly and impartial administration of justice by the court for all litigants by adherence to established and reasonable rules of court, this Honorable Court should grant a writ to the petitioner, to the end that he might be finally dismissed.

April 7, 1965

Respectfully submitted,
EDWARD STEHL, III
QUINLAN H. HANCOCK
Attorneys for the Petitioner

Appendix A

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 19th day of January, 1965.

(Style Omitted)

"The petition of Ralph E. McGregor for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Stafford County on the 30th day of April, 1964, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court."

Appendix B

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 14th day of October, 1964.

(Style Omitted)

"On consideration of the petition of Ralph E. McGregor for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Stafford County on April 30, 1964, it is ordered that the Commonwealth's Attorney for Stafford County file a response to the said petition on or before November 25, 1964."